

Service Date: December 21, 1992

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER of the Application )	TRANSPORTATION DIVISION
of GARY EUGENE PLOUFFE, DBA PLOUFFE)	
DISPOSAL SERVICE, St. Ignatius, MT )	DOCKET NO. T-9903
for a Class D Montana Intrastate )	
Certificate of Public Convenience )	ORDER NO. 6166
and Necessity. )	

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

Don Torgenrud, Esq., P.O. Box 490, St. Ignatius, Montana  
59865

FOR THE PROTESTANTS:

Rebecca T. Dupuis, Esq., P.O. Box 249, Polson, Montana  
59860, appearing on behalf of Flathead Disposal, Inc.

Timothy W. Balazic, d/b/a Northwest Disposal Service, 240  
Riverbend Road, Bigfork, Montana 59911

FOR THE COMMISSION:

Denise Peterson, Counsel, PSC  
Bonnie Lorang, Assistant Administrator,  
Transportation Division, PSC  
1701 Prospect Avenue, Helena, Montana 59620-2601

BEFORE:

TFD C. MACY, Commissioner & Presiding Officer

BACKGROUND

1. On June 25, 1992 the Montana Public Service Commission (Commission) received an application from Gary Eugene Plouffe, d/b/a Plouffe Disposal Service (Applicant), St. Ignatius, Montana, for a Class D Certificate of Public Convenience and Necessity to transport garbage and refuse between all points and places within Lake and Sanders Counties, EXCEPT for the area north of the junction of Highways 93 and 35 at Polson.

2. Following public notice of the application, the Commission received protests from the following: Flathead Disposal, Inc., Ronan, Montana, operating under PSC Nos. 1448 and 2870; Butte Services, Inc., Thompson Falls, Montana, operating under PSC No. 1995; Timothy W. Balazic, d/b/a Northwest Disposal Service, Bigfork, Montana, operating under PSC No. 2714; Chester W. Smith, d/b/a City Disposal, Hot Springs, Montana, operating under PSC No. 6369; Weston and Sandra MacDonald, d/b/a MacDonald Disposal, operating under PSC No. 1842; and Wesley A. Ekstrom, d/b/a W.A.E. Disposal, Plains, Montana, operating under PSC No. 3568.

3. Following issuance of proper notice, the Commission conducted a public hearing before Hearing Examiner and Commissioner, Ted Macy, on September 4, 1992 in the St. Ignatius Community Center, St. Ignatius, Montana, beginning at 10:00 a.m.

4. At the conclusion of the hearing, parties stipulated to a final order. After taking it under advisement, the Hearing Examiner granted Applicant's preliminary motion to file an amend-

ed Exhibit A on proposed modified service territory as testified to. The Examiner also required certain Late Filed Exhibits and briefing, if desired, on Federal/Tribal jurisdiction over garbage service motor carrier certification on the Flathead Reservation.

5. At the conclusion of the hearing, Butte Services, Inc., Verlan W. Smith and Weston L. MacDonald withdrew their protests upon filing and acceptance of an amendment to the service area as specified in the proceeding.

#### SUMMARY OF TESTIMONY

##### Applicant's Witnesses/Testimony

6. Mr. Gary Plouffe (Applicant), 2331 St. Mary's Lake Road, St. Ignatius, Montana, appeared and testified that Plouffe Disposal Service has provided garbage service since 1957, first by his father and later under his own business. Mr. Plouffe serves the area around St. Ignatius (a 7-mile radius) and wants to expand his service territory. He deposits the refuse at a landfill 28 miles north, near Polson, Montana. People normally call to request his service and he admitted that he has provided service at times to accounts located beyond his authorized territory, since 1988. His rates are competitive and proposed charges will allow him to make a profit while not undercutting the competition simply to obtain a market. Mr. Plouffe sponsored letters supporting his application.

7. Under cross-examination from Protestant Flathead Disposal, Inc., Mr. Plouffe testified that he wants to serve from the Polson junction of Highways 93 and 35 south to Lake County/Missoula County line and from Ravalli 3/4 of a mile to Dixon (Sanders County only). He has applied for expanded service because he has received calls as far away as Arlee, he testified. His purpose is to serve the general public. The Applicant has been in business since 1970 when he took over the business from his father. He has one employee besides himself, two pieces of equipment, and numerous containers. He does not want to compete in the Polson area itself where there are already three carriers.

8. Protestant's counsel submitted and questioned Applicant on Protestant's Exhibit 1, a Letter to Applicant dated May 19, 1992 from David Burchett, Chief, of the Public Service Commission Enforcement and Tariff Bureau, informing Mr. Plouffe that continued operations outside the scope of his certificate No. 3329 would subject him to enforcement actions. The letter urged Mr. Plouffe to inform his customers outside his service territory and to cease such service. Mr. Plouffe admitted that he did not comply with the letter and did not cease service. On further questioning, he testified that he had no intentions to serve Hot Springs, other than exempt government housing contracts.

9. Under further cross-examination, Mr. Plouffe admitted that he had served north of St. Ignatius to Polson, some to trib-

al members. He knew that he would be fined if caught, but he felt a responsibility to his customers. The procedures for obtaining PSC temporary authority were too lengthy, he testified.

10. Upon redirect examination, Applicant testified that he had filed this application seeking expanded operating authority as a result of the letter from the Commission.

11. David Cole Sagmiller, Westland Seed, Inc., Ronan, Montana, appeared and testified on behalf of the Applicant. In the past Flathead Disposal provided unsatisfactory service and so Westland called Mr. Plouffe and requested his service. Sometimes Flathead Disposal had failed to pick up his garbage; however, Mr. Plouffe has done well. Westland has had no complaints since Applicant has provided service. On cross-examination, Mr. Sagmiller admitted that he was not sure if Westland's concerns with Flathead's Service were ever relayed to Flathead Disposal.

12. Thomas Walchuk appeared and testified on behalf of the Applicant. He owned a ranch and has owned an RV Park in Ronan for about four years. More than four years ago, before he owned the RV Park, Flathead Disposal charged for "garbage that was not picked up," he testified. The service, when it was provided, was sloppy, he stated. On cross-examination, he admitted that his complaint occurred over four years ago (before the RV Park) and that Plouffe has provided service to the RV Park since then. He has 22 hook-ups at the Park and it is a seasonal business.

Protestant's Witnesses/Testimony

13. Marc Johnson, Flathead Disposal, Inc., Ronan, Montana, appeared and testified in opposition to the application for expanded service territory. Flathead Disposal, Inc. leases from Marc Johnson, an individual, PSC Nos. 1448 and 2870 which authorize Class D garbage service to Ronan and a 50 mile radius (excepting a limited area south of Evaro Hill to and from Ronan) and a 35 mile radius of Polson with certain limitations.

14. Mr. Johnson testified that to keep his permit intact he has continued to provide service in areas of his permit which have not always been profitable, such as the Evaro and Dixon areas. The growth in the urban areas has subsidized rural service. Getting the HUD contract in the Dixon area tripled the residences he serves there and resulted in a profit in that area last year.

15. Mr. Johnson testified that his equipment includes six to seven trucks total. He has three full-time and three part-time employees to maintain service throughout his permitted area. According to Mr. Johnson, he previously bought out two competing carriers because there was not enough business to keep both going in the extremely competitive environment. It was his hope that with time as the area increased in development, he would have the opportunity for a return on his investment. Mr. Johnson stated that it would be cheaper to serve only customers along US Highway 93 on the way to the landfill, but he has continued to serve rural areas. However, if he lost the Arlee ser-

vice area he would be unable to serve the rural customers. He has seen Plouffe dumpsters on the way to the landfill in Polson, he further testified.

16. In addressing the criticism of Mr. Sagmiller (FOF No. 10), Mr. Johnson testified that some Flathead Disposal's pick up days were "messed up" when "spud" trucks surrounded the dumpster on regular pickup days. Upon request, Flathead Disposal made extra pick up trips. Then there was a problem of two different people at Westland Feed requesting service. First Westland Feed requested one day a week service, then every other week service. Meanwhile, Cenex across the street received, upon request, twice a week service. For carrier convenience, Flathead Disposal picked up Westland Feed at the same time service was provided to Cenex. However, the rate was never raised to reflect increased service. Mr. Johnson testified that generally Flathead Disposal charges everyone comparable rates for comparable service. One restaurant in Ronan changed service to Plouffe for a "better deal," i.e., lower rates. The HUD and Tribal contracts help pay bills, he testified, and the tribe is a big customer for any business.

17. Under cross-examination, Mr. Johnson testified that the farm and ranch service is primarily in the main valley and not in the south areas and "fingers" going away from the landfill. Flathead Disposal has approximately 900 residential accounts and 300 commercial accounts (one account is for 400 houses). Mr. Johnson agreed to provide a late filed exhibit of loca-

tions, account numbers and list of rates charged. He sponsored Protestant's Exhibit Nos. 2 and 3, a Reservation Map and a Flat-head Disposal Service Map (Forest service map showing Lake, Sanders and Missoula Counties).

18. Verlan Smith appeared and testified in opposition to the application. He holds PSC No. 6369 which authorizes a Class D service territory within the City of Hot Springs, Montana and a twenty (20) mile radius, excepting the town of Plains and a ten mile radius. He had concerns about the Indian jurisdictional issue and stated that there was no need for additional service in his area, which, if granted, would harm his operation.

19. Timothy Balazic, d/b/a Northwest Disposal Service, Bigfork, Montana, appeared and testified in opposition to the application. He continued his protest of any duplicated service in the proposed area. Under his PSC No. 2714, Mr. Balazic provides Class D garbage service from Bigfork to the Missoula County Line down the Seeley Swan highway, as well as a 35 mile radius from Polson under a complicated service area running tangential to a 10 mile radius centered in Ronan. Mr. Balazic indicated that his costs were higher with longer miles to "dump," in order to serve his territory, and he could not afford any competition. Mr. Plouffe's proposed service would take accounts from him.

#### FURTHER FINDINGS AND DISCUSSION

20. In considering this application for extension of operating authority, the Commission is governed by the provisions of



§69-12-323, MCA, which require that the Commission determine whether the public convenience and necessity requires this service, whether other carriers with authority can or will provide the proposed service, and whether existing carriers will be adversely affected by the proposed service. Under §69-12-323(2)(b), MCA, the Commission may also consider the element of competition for purposes of Class D certificates.

21. First, the applicant must demonstrate that there is a public need for the proposed service. If the applicant fails to show this need, then the Commission shall deny the application. If, however, the applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If existing carriers are willing and able to meet this need, generally the Commission will deny an application for additional authority. However, if applicant shows that existing carriers cannot meet the need as well, the Commission asks whether granting additional authority would harm the operations of existing carriers contrary to the public interest, in which case the Commission will deny the application. If there would be no harm to existing carriers, the Commission will grant the authority, provided that the applicant has met a threshold burden of fitness to provide the proposed service. (See, Pan-American Bus Lines Operation, 1 M.C.C. 190, 203 (1936).)

22. The Commission may also consider the concept of competition in determining whether to grant a Class D certificate application to provide garbage pick-up service.

23. Applying traditional analysis to the evidence and testimony in the record, the Commission finds that there is a public need for the proposed service. The testimony and evidence from Applicant and the Protestants establish a public need for Class D motor carrier authority to pick up and haul garbage in the proposed service territory. In a civilized society, public need for garbage service is a given. However, there is no doubt that the existing carriers can and will meet the need to provide this service. The Applicant failed to show a public need that carriers cannot meet outside his lawful service area. Applicant has also failed to demonstrate that the existing carriers cannot meet the need as well. From the two complaining witnesses, testimony was vague, conflicting and remote in time. The Commission finds, therefore, that the application should be denied.

24. The Commission further finds that a grant of this additional operating authority would have harmed existing carriers, if there were not already cause to deny the application. Protestants testified that they are barely able to maintain their livelihoods and profits with the present service territories. In considering competition, the Commission finds that there is adequate competition where some existing authorities already overlap. The Applicant misconstrues the concept of competition, however, in first undercutting the charges of an existing carri-

er and then claiming the need for competition, particularly where the Applicant is taking the profitable and easy to reach customers along US Highway 93 to the landfill. Late filed Exhibit of Service/Customers.

25. The Commission does not need to reach the issue of fitness since it finds that the application should be denied. The Commission notes that Applicant has demonstrated fitness to provide service in his own service territory by providing service since 1970. Fitness, however, is a larger issue, as Protestant's attorney has pointed out. Pursuant to §69-12-401, MCA, a regulated carrier is obligated to comply with state law and Commission rules as propounded under Title 69, MCA. Applicant has deliberately exceeded the scope of his authority by providing service outside his service territory, even after notification of the violation from the Commission. Future noncompliance may subject the Applicant to a review of his fitness to provide the service already authorized.

26. Although Applicant has raised an issue of tribal jurisdiction, the Commission is not persuaded by arguments that the Commission has no jurisdiction on the Reservation. The Applicant has operated under authority previously granted by the Commission. The Applicant has applied for additional authority from the Commission. He cannot argue if he does not get the authority that he did not need it anyway. The Commission clearly has regulatory jurisdiction over garbage hauling on the Reservation. The State's regulatory interest is entrenched and signifi-

cant, outweighing the tribal interest where there has been no tribal motor carrier regulation on the Flathead Reservation. B.N. Railroad v. Department of Public Service Regulation, 221 Mont. 497, 720 P. 2d 267 (1986). In addition, the Flathead Reservation as a Public Law 280 Reservation historically exercises concurrent jurisdiction and recognizes the power of the State of Montana.

#### CONCLUSIONS OF LAW

27. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

28. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

29. Section 69-12-323(2), MCA, requires that the Applicant demonstrate "public convenience and necessity" in order to obtain additional operating authority in a service territory.

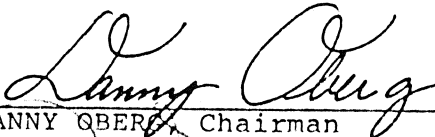
30. Section 69-12-323(2)(b), MCA, authorizes the Commission to consider competition in determining public convenience and necessity.


31. Following the hearing on the application and based on the evidence in this proceeding, the Commission concludes, as a matter of law, that public convenience and necessity do not require the granting of the application herein.


ORDER

NOW THEREFORE IT IS ORDERED that the application in Docket No. T-9903 be DENIED.

Done and Dated this 18th day of December, 1992 by a vote 4  
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DANNY QBERG, Chairman

  
WALLACE W. "WALLY" MERCER, Vice Chairman

  
BOB ANDERSON, Commissioner

  
TED C. MACY, Commissioner

ATTEST:

  
Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.